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**IN THE
COURT OF APPEALS OF INDIANA**

KELLY RAY UNDERHILL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 35A02-0511-CR-1109

APPEAL FROM THE HUNTINGTON CIRCUIT COURT

The Honorable Mark A. McIntosh, Judge

Cause No. 35C01-0412-FC-80

September 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Kelly Ray Underhill appeals his conviction for Child Molesting,¹ a class C felony. Specifically, Underhill claims that his conviction must be reversed because the trial court abused its discretion in admitting his oral and written confessions at trial. In essence, Underhill contends that his statements were involuntary because his lack of sleep and his “limited intelligence made him susceptible to falsely confessing.” Appellant’s Br. p. 8. Concluding that Underhill’s statements were properly admitted into evidence, we affirm the judgment of the trial court.

FACTS

Sometime during December 2004, Underhill and Shannon Denton met in an Internet chat room. Around Christmas of that year, arrangements were made for Underhill, who lived in French Lick, to meet Denton and her two children at their Huntington residence. When Underhill was on his way to Denton’s home, his vehicle broke down. As a result, Denton and her children—six-year-old L.M. and ten-year-old M.M.—drove to the location, picked up Underhill, and drove him to her residence.

On the evening of December 27, 2004, when Denton left for work, Underhill, M.M., L.M., and another child were in Denton’s bed watching a movie. At some point, Underhill placed his left hand down M.M.’s underwear and rubbed the outside of her vagina and “butt” for approximately five minutes. Tr. p. 226, 228-30, 287, 361-62, 368-70, 376-77. Following this incident, M.M. told her cousin what had occurred. Her cousin then told Denton’s sister, April Myers, who was also at the residence. As a result, Myers called Denton at work and

¹ Ind. Code § 35-42-4-3.

told her about the episode. At Denton's request, Myers reported the incident to the police.

Shortly after 1:30 a.m. on December 28, Huntington police officers arrived at the residence and Underhill supplied them with his identification. Underhill was then transported to the police station and placed in an interrogation room. Underhill was handcuffed to a chair that was pulled up to a table. At approximately 2:00 a.m., Detective Chad Hacker began interviewing Denton, Myers, and the other children who had been at the residence. The police periodically checked on Underhill and noticed that he appeared to be sleeping at the table. Sometime after 7:00 a.m., Detective Hacker entered the room, removed Underhill's handcuffs, and gave him a cup of coffee. Detective Hacker then escorted Underhill to smoke a cigarette. Thereafter, Detective Hacker took Underhill to his office and read him the Miranda² warnings. Underhill waived these rights both orally and in writing at approximately 7:25 a.m.

Detective Hacker informed Underhill that M.M. had accused Underhill of fondling her vaginal area and buttocks. Underhill denied these allegations. After talking for nearly one hour, Detective Hacker asked Underhill to write a statement as to what had occurred on the evening of December 27, 2004. When Underhill began writing, he continued to deny any wrongdoing. While Underhill was writing, Detective Hacker telephoned Investigator Ron Hochstetler, a retired police officer who was working for the Huntington County Prosecutor and had experience in investigating child sex abuse crimes. Detective Hacker suggested that

² Miranda v. Arizona, 384 U.S. 436 (1966).

Investigator Hochstetler meet with Underhill. Underhill agreed to the meeting, and Detective Hacker drove Underhill to the prosecutor's office. When they arrived, Hochstetler told Underhill that he did not have to talk, but if he did, he expected him to be truthful. Hochstetler then re-advised Underhill of the Miranda warnings and proceeded to tell Underhill about a counseling program for sex offenders in Marion that could assist Underhill. Shortly thereafter, Underhill admitted in a recorded statement that he had touched M.M.'s vaginal area and buttocks. Detective Hacker was then called back to the interview room, whereupon Underhill admitted that he had not been truthful when he had given his statement at the police station. Detective Hacker and Underhill returned to the police station, where Underhill completed his written statement and admitted that he had molested M.M. As a result, Underhill was arrested and charged with class C felony child molesting.

Prior to trial, Underhill moved to suppress his statements, alleging that he had not made them voluntarily. Following a hearing, Underhill's motion was denied, and his statements were admitted at trial over his objection. Underhill was found guilty as charged and sentenced to four years of incarceration with two years suspended to probation. Underhill now appeals.

DISCUSSION AND DECISION

In addressing Underhill's claim that his statements were involuntary and thus erroneously admitted into evidence, we initially observe that the admission of evidence is left to the sound discretion of the trial court and the trial court's determination will be reversed on appeal only for an abuse of that discretion. Maxwell v. State, 839 N.E.2d 1285, 1287

(Ind. Ct. App. 2005). An abuse of discretion occurs only where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id. Additionally, when reviewing the trial court's exercise of its discretion in admitting a defendant's statement into evidence, this court will not reweigh the evidence and we will consider conflicting evidence most favorable to the trial court's determination. Turner v. State, 738 N.E.2d 660, 662 (Ind. 2000). If there is substantial evidence to support the trial court's conclusion, it will not be set aside. Richey v. State, 426 N.E.2d 389, 392 (Ind. 1981).

Next, we note that when a defendant challenges the voluntariness of a confession, the State must prove "beyond a reasonable doubt that the defendant voluntarily waived his rights, and that the defendant's confession was voluntarily given." Miller v. State, 770 N.E.2d 763, 767 (Ind. 2002). In evaluating a claim that a statement was not voluntary, the trial court is to consider the totality of the circumstances, including "the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health." Id. To determine that a confession was given voluntarily, the court must conclude that inducement, threats, violence, or other improper influences did not overcome the defendant's free will. Clark v. State, 808 N.E.2d 1183, 1191 (Ind. 2004). A defendant's lack of sleep may be a factor in determining voluntariness. Ringo v. State, 736 N.E.2d 1209, 1213 (Ind. 2000). We examine the record for substantial probative evidence of voluntariness. Schmitt v. State, 730 N.E.2d 147, 148 (Ind. 2000).

In this case, the record shows that Underhill was brought to the police station sometime after 1:30 a.m. on December 28, 2004, and placed in a small conference room. Tr.

p. 58-61. Underhill had one hand cuffed to a chair and was left alone while Detective Hacker interviewed M.M. and other family members. At approximately 3:00 a.m., Detective Hacker checked on Underhill and observed him with his head down on the table. Id. at 17, 20, 51, 270-71, 291-94. Detective Hochstetler again looked into the conference room at 6:00 a.m. and saw Underhill sleeping. Id. at 77, 399.

Underhill testified that he slept for approximately four and one-half hours and had been awake since 8:30 a.m. the previous day. He acknowledged that he was able to nap in the conference room. Tr. p. 94, 502-03. Underhill also testified that he had recently been released from the army and had learned to forego sleep for long periods of time while still being able to function normally. Id. at 100. Underhill's recorded statement does not indicate that he was deprived of sleep, was tired, or that his statement was in any manner affected by an apparent lack of sleep. Id. at 331-84.

Also, although Underhill had one hand cuffed to his chair in the interrogation room, he has not shown how the voluntariness of his confession was affected. There is no evidence that Underhill was so tightly handcuffed or restrained to the extent that he suffered any physical pain. Moreover, the handcuffs were removed sometime after 7:00 a.m., and Underhill was no longer restrained until he was arrested later that day. Tr. p. 45, 85, 274-75, 477.

Underhill has also failed to establish that his alleged impaired mental capacity affected the voluntariness of his confession. In any event, our Supreme Court has established that diminished mental capacity alone is not a cause for excluding evidence. Stevens v. State,

770 N.E.2d 739, 750 (Ind. 2002). It is but one factor to consider in determining whether the confession was freely and knowingly given. Haviland v. State, 677 N.E.2d 509, 515 (Ind. 1997). A defendant's claimed mental condition does not render a confession involuntary absent coercive police conduct. Brown v. State, 698 N.E.2d 1132, 1142 (Ind. 1998).

In this case, Underhill testified at the suppression hearing that he had completed the tenth grade and ultimately received his GED. Tr. p. 91. Not until trial and after his statements were properly entered into evidence did Underhill complain of a "low" mental capacity. Id. at 430-32, 435, 493-95, 498. In particular, Underhill testified that he was a "slow learner" and had difficulty passing tests and examinations. Tr. p. 430-32, 435, 495. By the same token, it was established that Underhill could read and write, had obtained a driver's license, was qualified to serve in the army, and was apparently literate enough to use a computer and access an internet chat room. Id. at 80, 432, 435-37, 493-95, 498. Further, our examination of Underhill's written statement reveals that it is coherent and it tells a logical and chronologically progressive sequence of events. And Underhill's recorded statement reveals that his answers were responsive to the questions posed by the officers. Id. at 331-84.

Finally, there is no showing that Underhill was subjected to any unduly coercive police conduct that might have overcome his free will. A confession is inadmissible if it is obtained by promises of mitigation or immunity, but vague and indefinite statements by the police that it would be in a defendant's best interest if he cooperated do not render a subsequent confession inadmissible. Clark, 808 N.E.2d at 1191. Here, Underhill was

advised of the Miranda warnings by Detective Hacker and was reminded of those rights by Hochstetler. Tr. p. 22-23, 275-79, 297, 325. Underhill was also informed that he was not under arrest at the time of the statement and that he did not have to talk with the detectives. Id. at 71, 75, 407. Moreover, Hochstetler explained that he might be able to help with the counseling program if Underhill told him the truth. Id. While Hochstetler's comments may have amounted to an attempt to induce Underhill to tell the truth, we cannot say that they rose to the level of threats, inducements, or promises of benefits that rendered his confession involuntary.

In sum, Underhill has failed to establish that his confessions were anything but voluntary. Underhill's allegations regarding the lack of sleep, physical restraint, and low mental capacity—individually and collectively—fail to establish that he was improperly induced or threatened into confessing. As a result, we conclude that the trial court properly admitted Underhill's statements into evidence.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.